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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 486

RALPH HUBERT HOUSTON, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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No.

RALPH HUBERT HOUSTON, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States of America:

Petitioner, Ralph Hubert Houston, Jr., by his attorney, S. Gunter Toney, presents this his Petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW

The District Court entered judgment and imposed sentence but did not hand down an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is attached hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner seeks to have reviewed a judgment of the United States Court of Appeals, Fifth Circuit, dated the 28th. day of June, 1968, affirming the judgment and sentence of the United States District Court for the Middle District of Georgia, Albany Division, on appeal; the Petition for Rehearing was denied on the 7th. day of August, 1968, and is included in the certified transcript of the record filed herewith.

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals, Fifth Circuit, is 62 Statutes 928 (June 25, 1948, Chapter, 646).

QUESTIONS PRESENTED FOR REVIEW

The points relied on by the Petitioner for granting of the Writ of Certiorari, is as follows:

POINT ONE: DID APPELLANT INTELLIGENTLY RELINQUISH OR ABANDON FUNDAMENTAL CONSTITUTIONAL RIGHT TO ATTACK METHODS AND STANDARDS USED IN SELECTION OFJURY IN THE ALBANY DIVISION OF THE DISTRICT COURT WHERE THE RECORD IS SILENT AS TO ADVICE GIVEN AT TIME OF EXECUTION OF WRITTEN WAIVER,

POINT TWO: MAY A CONVICTION OF POSSESSION, AND CARRYING ON THE BUSINESS OF DISTILLERS OF SPIRITOUS LIQUORS WITHOUT HAVING GIVEN BOND AND WITH INTENT TO DEFRAUD THE UNITED STATES OF TAX IMPOSED IN VIOLATION 26 USC SECTIONS 5179 (a), 5173, 5601 (a) AND 5602, BE SUSTAINED IN THE ABSENCE OF PROOF THAT DISTILLING APPARATUS WAS SET UP?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the the right to aspeedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTES AND RULES INVOLVED

Rule 18 of the Federal Rules of Criminal Procedure provides:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

STATEMENT OF THE CASE

Appellant and nine co-defendants were indicted by the Grand Jury of the United States District Court for the Middle District of Georgia, Albany Division (R. 1-9).

Count one charges thirteen overt acts in furtherance of a conspiracy to violate the Internal Revenue Laws pertaining to nontax paid whiskey.

Counts two, three and four charge that on April 25, 1967, appellant and others did possess (Count Two), carry on the business of distillers without giving bond (Count Three) and with intent to defraud the United States of the tax imposed thereon (Count Four) (R. 5-6).

Prior to trial and in the absence of the Court Reporter, appellant and other defendants entered into a stipulation agreeing to be tried in the Albany Division of such court by the jury as then constituted and purportedly waived their right to attack the methods and standards used in selecting the grand and petit jurors. The record is silent as to the specific advisement of rights purportedly given at the time of execution of such stipulation nor does the stipulation reflect that Appellant was advised of his right to object to the jury as drawn in the Albany Division and to be tried in such division when the jury had been lawfully selected.

Appellant and the other defendants were jointly tried by jury. The following verdicts were rendered as to Appellant: Count One (conspiracy)—Guilty; Counts Two, Three and Four (Still Counts)—Guilty; Count Six (transportation of non-tax-paid liquor)—Mistrial; Count Ten (possession of property) —Guilty. The Court of Appeals, Fifth Circuit reversed as to Count Ten.

The Government's evidence established that Appellant and others were apprehended at an alleged still site on April 25, 1967. Appellant testified that he and a co-defendant were stopped on the highway, arrested and taken to the still site in question. No testimony was offered to show that said still was set up and complete.

Trial counsel for Appellant and all other defendants failed to object to trial in the Albany Division, to file pretrial motions to suppress illegally seized evidence, to object to hearsay testimony, to move for judgments of acquittal as to all counts, to file motions for new trial, to prepare and file Appellant's brief on appeal to the United States Court of Appeals, Fifth Circuit.

ARGUMENT.

POINT ONE: DID APPELLANT INTELLIGENTLY RELINQUISH OR ABANDON FUNDAMENTAL CONSTITUTIONAL RIGHT TO ATTACK METHODS AND STANDARDS USED IN SELECTION OF JURY IN THE ALBANY DIVISION OF THE DISTRICT COURT WHERE THE RECORD IS SILENT AS TO ADVICE GIVEN AT TIME OF EXECUTION OF WRITTEN WAIVER?

The Constitution of the United States grants an accused the right to a trial within the state and federal district in which his offense was committed, Article III, Section 2, Clause 3, and Sixth Amendment.

Rule 18 of the Federal Rules of Criminal Procedure provides:

"Rule 18. Place of Prosecution and Trial.
Except as otherwise permitted by statute or by these

rules, the prosecution shall be had in a district in which the offense was committed. The Court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

All counts of the Indictment charge the offenses to have been committed in the Albany Division of the Middle District of Georgia (R. 1-9).

The appellant, and all other defendants, executed Stipulations on September 27, 1967, agreeing to be tried in the Albany Division of such court by the jury as then consituted and purportedly waived their right to object and attack the methods and standards used in selecting the grand petit jurors (R. 20-23).

Appellant contends that prior to execution of such Stipulations he and other defendants conferred with his trial counsel in the presence of the United States Attorney, at which time he was advised of his right to object to trial in the Albany Division of the court on the ground that the jury as then constituted was defective and that if he so objected he would be tried in the Macon Division of the court at a later date. Appellant during such conference was not advised of Rule 18 of the Federal Rules of Criminal Procedure allowing the trial court to fix the place of trial within the District with due regard to the convenience of the defendants and witnesses. Appellant further contends that he executed such Stipulation and Waiver out of fear of being tried in the Macon Division of the court with jury panel consisting of strangers. (See attached affidavit).

The practice of the trial court and the United States Attorney of the Middle District of Georgia, in presenting such Stipulations and Waivers and in the event the accused declines to waive his right to object to a jury that had not been

reorganized in accordance with *Rabinowitz v. United States*, 5 Cir., 1966, 366 F. 2d. 34 and *Jackson et. al. v. United States*, 5 Cir., 1966, 366 F. 2d. 34, has been before The Fifth Circuit in the case of *Dupoint v. United States*, 5 Cir., No. 24,635. In Dupoint, the accused declined to sign a similar waiver in the Thomasville Division of the Court, and the cause was docketed and tried in the Valdosta Division of the Court over his objection. The Court of Appeals reversed and ruled that the accused had the right to be tried in the Thomasville Division of the Court.

Perhaps the Affidavit of the Appellant attached to this Petition is inappropriate to bring the facts before this Court showing that Appellant did not intelligently waive his right to object to trial before the Albany jury, but was coerced into such action.

It is suggested in the alternative that the Government may wish to concede such practice or this Court may wish to remand the cause to the trial court for the purpose of establishing a record of such practice together with the actual facts and circumstances surrounding the execution of the Stipulation and Waivers.

This Court in the case of *Johnson v. Zerhst*, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, held:

> "There is insistence here that petitioner waived their constitutional right (of counsel). The District Court did not so find. It has been pointed out that *'courts indulge every presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.* The determination of whether there has been an intelligent waiver of right to

counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (Emphasis supplied.)

It is submitted that Appellant was mislead and not given sufficient information as to intelligently and intentionally relinquish or abandon his right to a properly constituted jury in the Albany Division of the court.

Appellant was not advised by the trial court, the United States Attorney or his trial counsel that he need not fear being tried in the Macon Division of the Court but could avail himself of the right to insist upon trial in the Albany Division at a subsequent term before a lawful jury.

POINT TWO: MAY A CONVICTION OF POSSESSION, AND CARRYING ON THE BUSINESS OF DISTILLERS OF SPIRITOUS LIQUORS WITHOUT HAVING GIVEN BOND AND WITH INTENT TO DEFRAUD THE UNITED STATES OF TAX IMPOSED IN VIOLATION 26 USC SECTIONS 5179 (a), 5173, 5601 (a), AND 5602, BE SUSTAINED IN THE ABSENCE OF PROOF THAT DISTILLING APPARATUS WAS SET UP?

Counts Two, Three and Four charge that on April 25, 1967, the appellant and the defendants did possess (Count Two), carry on the business of distillers without giving bond (Count Three), and with intent to defraud the United States of the tax imposed thereon (Count Four) (R. 5-6).

The Government's testimony established that the Appellant and the defendant were apprehended at an alleged still site. Appellant testified he was stopped on the highway, arrested and taken to the still site.

No testimony was offered to show that the said still was set up and complete.

Officer James V. Allred testified to his trailing the defendants to the still site and the fact of their arrest (R. 38-44).

He described the distillery as follows:

"A. Well, it was parked at the distillery. It was a large still pot, call it a 30 sack pot; it would hold about 2700 gallons . . .

A: Now, tell us again the first time that your were at that still for observation purposes, the first time you knew about it and when you came there?

A: On April 25, that afternoon.

Q: And what did you discover on that date?

A: That the still was being - was set up . . . (R. 84).

Q. All right, what was there at the still?

A: There was a large still pot, as I say, it would hold 2700 gallons; there was a new water pump, a Jagger water pump connected with inch and half black plastic pipe; there were cartons of new red plastic jugs just like this one.

Q: Just like this one?

A: Yes, sir, made by Apex, white and blue and got the same manufacturing date on it.
(74) Q: What else?

A: The still was charged; it was still hot; you couldn't touch it.

Q: When you say "charged", what do you mean?

A: It had been loaded. The bran was in it, had just freshly been loaded. It was capped up with brand and water and then the ingredients, some grain derivative in the bed.

Q: You told us about the sugar and yeast?

A: Yes, sir, and there were yeast cans . . .

A: There were several yeast cans lying there at the still and a smouldering fire; and you could see where they had burned sugar sacks, Dixie Crystal sugar, and parts that were just smouldering, the edges of them.

Q: You say the still was charged up; tell us what stage of whiskey-making that is in the distilling process?

A: Well, that's when you load it, you put your grain (75) and your sugar and your water and your yeast; and a lot of the violators generally put a cap on it, put the bran on it at that time.

Q: You said the still was hot?

A: Yes, sir, they were heating the ingredients and melt the sugar and stir it good and get it kicked off; mix the yeast and all with the bed; and this is the shape that this particular still was in; it had just been loaded.

Q: *Will you tell us whether or not that still was set up?*

A: *Yes, sir, it was heavy gauge steel, set on those concrete blocks, had the burner under it, regular distilling burner, illegal distilling burner.*

Q: Did you see any sign that this still was registered as required by law?

A: No, sir, there was not.

Q: This was out in the woods, you say?

A: Yes, sir.

Q: Was it a remote area?

A: Yes, sir.

By the Court:

Q: *This still was it set up like the others you've been describing?*

A: *Yes, on the same type of concrete blocks and the same type metal, rectangular in shape, about 10 or 12 (76) feet long; and it measure out to hold 27000 gallons . . .* (R. 86-87) (Emphasis supplied).

Q: What are some of the others that you see?

A: Well, some are round and some will be rectangular and long and short. This particular one though was set up just like the others that I've testified about and set upon regular cement concrete blocks.

Q: You say there was a water pump there?

A: Yes, sir . . .

Q: How many jugs were there, do you recall?

A: There was more than 40 of them there . . . (R.88-89).

Q: Did you see anything else at the still or have you told us all that you saw at the still?

A: No, sir, that same '53 Ford pickup truck was there that I had seen at the stash in Mitchell County and observed haul a load of sugar from Mr. Houston's house . . . (R. 90).

Officer Raymond D. Harrison testified that he observed the defendants at the still site, made his presence known and assisted in their arrest.

He described the "distillery" as follows:

"Q: Then, what else did you see out there on the 25th?

"A: At about 9:00 P. M. Investigator Smith and I joined Special Investigators Oxley and Purvis near the distillery, at which time I could see a fire at the distillery.

Q: A fire?

A: Yes sir, a blaze. (R. 162) . . .

Q: All right, what did you see down there at the still?

A: There was one large tank type still, approximately 2700 gallon capacity. The still was hot; the mash inside of it was sweet.

Q: You testified earlier you saw a fire at the still; were you able to determine what type of fire that was?

A: There was a smoldering fire after we had raided the distillery, where some sugar sacks had been burned, along with one pound yeast cans, the ashes and just a few scattered pieces of sugar bags was all that was left.

Q: And that was the fire you saw?

A: Yes sir, I think so.

Q: Are you saying there was no fire under the still?

A: Not at that time, no sir.

Q: You did testify, didn't you, that the still was hot?

A: That's correct." (R. 163-164).

Officer Riley J. Oxley testified that he assisted other officers in the arrest of the defendants at said still site; observed a blazing fire, heard a water pump running and the noise of a burner but did not describe the still as set-up and complete (R. 186-195).

Officer Harry M. Smith testified that he was present at the still site in question. He did not testify as to his observations or describe the alleged distillery (R. 209-210).

The above quoted testimony and Government's Exhibits consisting of photographs, plastic jugs and "Bran" sacks, constitute all the evidence bearing on the issue of whether the distillery was set up.

The Government's evidence failed to disclose:

I. Whether the described apparatus was "set up", that is, readily capable of being set up in an operating state.

2. Whether the still apparatus, as described, included a condenser and was connected thereto.

In the case of *Liberman v. United States*, 4 Cir., 1958 260 F. 2d 284, 285, the Court reversed a conviction of possession of an unregistered still and carrying on the business of a distiller without giving bond. The *evidence showed as county police approached a house in a rural area, two men fled from an adjacent garage.* The agents found a *large still,* an *accumulation of mash on the floor, sixty feet of hose, twelve large barrels, in one of which was spent mash,* and in another, *106 gallons of live mash ready for distillation.* There was a *water well* and *fire bricks* which had been used. A *gasoline driven pump was pumping mash from a barrel into an open field.* The still was not in operation, and the officers discovered *no boiler, condenser or coils. No whiskey* was on the premises.

The Court held:

> "That a still had been operated was clear enough, but it was equally plain that *essential parts of the apparatus had been removed before the officers' arrival, and that at the time of seizure the still was not ready to operate.* . . . It is enough to constitute a violation if the still is readily capable of being set up in an operating state . . ."

26 U.S.C.A., Section 5179, sets forth the duty to register ". . . any still or *distilling apparatus set up,* shall register such still or apparatus with the secretary . . . "

The jury would necessarily have to indulge in conjecture, surmise and suspicions to infer the following:

1. That the component parts described by the witness con-

stituted a still, notwithstanding the absence of evidence of a condenser.

2. That the still, as inferred in Number 1 above, was "set up" or readily capable of being set up in an operating state notwithstanding lack of evidence of the particular still having been set up and the absence of whiskey.

The Circuit Court in its opinion holding the evidence sufficient as to the still counts, which allege the offense to have occurred on April 25, 1967, mistakenly found "other evidence" in the record showing the still was complete. In footnote number 2, page 3 of the opinion, the Circuit Court stated:

> "Appellant contends that the testimony only shows that the still was 'set up' by being placed as were other stills on foundations above the ground. There are inferences to that effect, *but there is other evidence showing that the still was complete,* . . . On cross-examination (R. 99, et seq.) defense counsel brought out that *'this particular still was a small still, set up with barrels . . . and 'they had the cooker . . . the condenser was not a large condenser,'* the water supply 'was right on the bank . . . ' it had no pump (this was disproved by testimony of Officer Aldredge, see R. 86). The evidence was sufficient to uphold the verdict of guilty and 'to prevent a miscarriage of justice'." (Emphasis supplied).

The "other evidence" concerned a still site located on September 30, 1966.

Evidence of component parts of a still located on September 30, 1966, six months and twenty-five days prior to the still offenses alleged in counts two, three and four of the Indictment, could not lawfully aid the Government's proof to show the still in question was "set up" and complete.

The conviction of appellant which was secured by such evidence at the hands of an illegally selected jury in the Albany Division of the District Court, which Appellant was forced to accept for fear his cause would be transferred to the Macon Division of the Court, where he would be tried by a jury composed of strangers, is a miscarriage of justice which should be reveiwed and corrected by this court.

PRAYER

WHEREFORE, Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court consider the certified Transcript of Record filed herewith and on hearing, the Judgment of the United States Court of Appeals, Fifth Circuit, affirming the Judgment and Sentence of the District Court of Georgia, be quashed, and Petitioner further prays for such other further general relief as may be meet and proper.

Respectfully submitted,

TONEY AND GUARISCO
200 East College Avenue
Tallahassee, Florida

Attorneys for Petitioner.

S. GUNTER TONEY

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing petition for Writ of Certiorari, by mail, to the Honorable Flloyd Buford, United States Attorney, Macon, Georgia, and a copy to Solicitor General, Department of Justice, Washington 25, D. C., on this day of September, 1968.

S. GUNTER TONEY

APPENDIX.

AFFIDAVIT.

STATE OF FLORIDA:
COUNTY OF LEON:

Before me, the undersigned authority, personally appeared EDWARD BROOKINS and RALPH HUBERT HOUSTON, JR., who being by me first duly sworn depose and say:

That we were present on September 27, 1967, in the United States District Court for the Middle District of Albany, Georgia, and were advised by our trial counsel, Honorable E. Lewis Adams, in the presence of Honorable Floyd Buford, District Attorney in the United States Probation Office, that we had a right to object to trial in Albany, Georgia, since the jury was illegally constituted and that if we did object to being so tried that the United States Attorney advised our attorney we would have to be tried in Macon, Georgia, at a later time.

We signed an Agreement to be tried in Albany, Georgia, but in doing so understood that we had no choice except to be tried either then at Albany, Georgia, or later in Macon, Georgia. We were not advised of the rules of the Supreme Court of the United States that the trial judge had a right to transfer our case from Albany, Georgia to Macon, Georgia, only if the judge decided that the transfer was for the convenience of the persons to be tried. Had we known that we had a legal right to object to trial in Albany, Georgia, and had a right to be tried later in Albany, Georgia;

before a new jury, we would not have signed the Agreement set forth on Pages 20 through 23 of the printed transcript of the record filed in this case. The major reason for our signing the Agreement was our fear of being tried in Macon, Georgia, with a jury of strangers.

Dated this 10th day of February, 1968.

EDWARD BROOKINS,
(Edward Brookins).
RALPH HUBERT HOUSTON, JR.,
(Ralph Hubert Houston, Jr.).

Subscribed and sworn to before me this 10th day of February, 1968.

S. GUNTER TONEY,
Notary Public, State of Florida
at Large.

My Commission Expires March 10, 1969.

Bonded By American Fire & Casualty Co.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25445

EDWARD BROOKINS and RALPH HUBERT HOUSTON, JR.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Middle District of Georgia.

(June 28, 1968.)

Before BROWN, Chief Judge and BELL, Circuit Judge, and HOOPER, District Judge.

HOOPER, District Judge: Appellants Brookins and Houston were found guilty and sentenced under Count Ten, and appellant Houston upon Counts Two, Three and Four of an indictment returned against them and other defendants, as set out below.

(1) Their first specification of error alleges that, although appellants by stipulation had waived their

right to attack the selection of the jury in the Albany Division of the court, such waiver was coerced by threats to transfer the cause to the Macon Division of the court.

This contention is clearly without merit. Assuming without deciding that appellants have made sufficient allegations to show that the indictment was defective because of the composition of the Grand Jury, and that the composition of the Petit Jury box was also defective, it nevertheless appears that not only did appellants fail to move to abate the trial in the Albany Division, but on the contrary they and their counsel expressly waived any objection that might have been raised. Their written stipulations were made after both the Court and their counsel had advised them of their rights, and the stipulations were approved by the Court.

Appellants now seek by affidavits filed in this Court to show that they executed the stipulations because they were fearful of being tried in the Macon Division.

In the instant case there was not only a failure by appellants and their counsel to object, but on the other hand, an express affirmative waiver. This appellate court

> "[C]an only take the record as it finds it, and cannot add thereto, or go behind, beyond, or outside it, and it will not prosecute an independent inquiry"

as to what happened in the lower court, not ruled upon by the district judge. See 4A C.J.S., Appeal and Error, §1206, at p. 1333.

(2) Appellant Houston having been found guilty under Counts Two, Three and Four contends that the evidence does not support the verdict and judgment. Only as to Count Two did he make a motion for judgment of acquittal. However, this Court has reviewed the evidence as to all three counts and finds it to be sufficient.[1]

As to Count Two, however, appellant Houston did make a motion for judgment of acquittal which was overruled and he was found guilty of violation of 26 U.S.C., §5601(a), §5179(a), regarding possession of a distillery set up in violation of law. After careful consideration we find that the evidence was sufficient to convict upon that Count.[2]

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[1] Where no motion is filed pursuant to Rule 29, Federal Rules of Criminal Procedure, appellant must show "manifest error," *Moomaw v. United States*, 220 F.2d 589 (5th Cir. 1955), or, in order to "prevent a miscarriage of justice" on account of "plain error" (*Mitchell v. United States*, 208 F.2d 854 (8th Cir. 1954); *Demos v. United States*, 205 F.2d 596 (5th Cir. 1953).

[2] Appellant contends that the testimony only shows that the still was "set up" by being placed as were other stills on foundations above the ground. There are inferences to that effect, but there is other evidence showing that the still was complete. Further cross-examination by counsel for appellant might, or might not, have disclosed weaknesses in the testimony of Officer James V. Allred (R. 38-44). He stated "the still was charged, it was still hot, you couldn't touch it", there was a smoldering fire, defendants "were heating the ingredients and melt (sic) the sugar and stir it good and get it kicked off. . ." . . "it had just been loaded . . . ."

All the foregoing indicated that the still was sufficiently set up. On cross-examination (R. 99, et seq.) defense counsel brought out that "this particular still was a small still, set up with barrels" . . . and "they had the cooker . . . the condenser was not

(3) We find, however, that the attack made by both appellants concerning judgment of guilty under Count Ten (violating 26 U.S.C., §5686(a)), charging unlawful possession of property which had been used for making liquor, is well founded.

An L.P. gas tank was seen by officers two hundred yards from a still. The Government agent put his initials on the tank, but did not seize it. Some five months later appellant Brookins was found driving a truck in which appellant Houston was a passenger, the tank in question being on the truck. There is not sufficient evidence to show beyond a reasonable doubt that the tank was ever used in the illicit manufacture of liquor.

The case is remanded to the District Judge with instructions to vacate and set aside the judgment of each of appellants under Count Ten. The judgments of guilty on the other counts are AFFIRMED.

REVERSED in part, AFFIRMED in part.

a large condenser", the water supply "was right on the bank . . ." it had no pump (this was disproved by testimony of Officer Aldredge, see R. 86). The evidence was sufficient to uphold the verdict of guilty and "to prevent a miscarriage of justice."

The case cited by appellant, *Liverman v. United States*, 260 F.2d 284 (4th Cir. 1958), does not require a contrary ruling.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25445

D. C. Docket No. CR. 3059

EDWARD BROOKINS and
RALPH HUBERT HOUSTON, JR.,

Appellants,

Versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, Chief Judge and BELL, Circuit Judge, and HOOPER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed in part and this cause be, and the same is hereby remanded to the District Court with instructions to vacate and set aside the judgment of each of appellants under Count Ten.

June 28, 1968

Issued as Mandate: Aug. 15, 1968

U. S. Court of Appeals
FILED
Aug. 7, 1968
Edward W. Wadsworth, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25445.

EDWARD BROOKINS and
RALPH HUBERT HOUSTON, JR.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the Middle District of Georgia

(August 7, 1968)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, BELL, Circuit Judge, and HOOPER, District Judge.

PER CURIAM

The matters complained of in the petition for rehearing have already been carefully considered by the court. Motion for rehearing is

DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 486

RALPH HUBERT HOUSTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after trial by jury in the Albany Division of the Middle District of Georgia, on three substantive counts charging violations of the provisions of the Internal Revenue Code relating to illegal distilling operations and, with eight others, of conspiracy to violate these provisions. The conspiracy (count one) was charged to have existed from September 30, 1966 until May 19, 1967, and to have had as its objective the possession of unregistered stills, the carrying on of a distillery business without

giving bond as required by law and with intent to defraud the government of taxes, the concealment of untax-paid whiskey with intent to defraud the government of taxes, and the possession and transportation of whiskey whose containers did not have tax stamps affixed thereon (R. 1-5). The substantive counts charged that within the period of the conspiracy, petitioner and certain codefendants possessed an unregistered still (count two), carried on a distillery business without giving bond (count three), and carried on such business with intent to defraud the government of taxes (count four) (R. 5-6).

Petitioner was sentenced to concurrent terms of four years' imprisonment on each count (R. 456, 467). The court of appeals affirmed his conviction on each of these four counts (Pet. App. 19-23).[1]

1. Petitioner challenges the sufficiency of the evidence on the three substantive counts, on the ground that there was no evidence to show that the still was "set up" and complete on the date in question. There is, however, no occasion to consider this contention. The evidence on the conspiracy count and petitioner's connection therewith—the sufficiency of which has

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[1] The court of appeals reversed petitioner's conviction on count 10—charging the possession of property used in violation of the laws against illegal distilling (26 U.S.C. 5686(a))—on the ground that there was insufficient evidence to show that this property (a gas tank) was used in the manufacture of liquor (see Pet. App. 22). The jury disagreed as to count six, which charged petitioner and two codefendants with transporting whiskey whose container did not have a tax stamp affixed thereon, in violation of 26 U.S.C. 5205(a)(2), 5604(a).

never been challenged—was not limited to activities which formed the basis of the substantive counts in which he was named; to the contrary, it was alleged and proved that he personally participated in the commission of a variety of overt acts in furtherance of the conspiracy, six of which (Nos. 1-4, 7, 9) were not covered by the substantive counts in which he was named (R. 3-5). Accordingly, the claimed insufficiency of the evidence supporting petitioner's substantive conviction would not affect the validity of his conspiracy conviction. Since he received a concurrent sentence for each count which was less than the statutory maximum (R. 455-456), it is unnecessary to consider the sufficiency of the evidence supporting the verdict on the substantive counts. *United States* v. *Romano*, 382 U.S. 136, 138; *United States* v. *Gainey*, 380 U.S. 63, 65; *Lawn* v. *United States*, 355 U.S. 339, 359.

In any event, petitioner's contention was correctly rejected. A still is "set up" within the meaning of the statutory provisions proscribing illegal distilling operations when, although some minor adjustment may be necessary, the still is essentially capable of immediate operation. See *Guy* v. *United States*, 336 F. 2d 595 (C.A. 4); *United States* v. *Moses*, 205 F. 2d 358, 359 (C.A. 2); *Otto* v. *United States*, 29 F. 2d 504, 505 (C.A. 7). Unlike *Liverman* v. *United States*, 260 F. 2d 284 (C.A. 4), relied upon by petitioner, where the still was in fact dismantled when the accused was arrested on the premises, in this case there was direct testimony that it was "set up" (R.

84, 86-87) and operating (R. 163, 192, 194, 230). The evidence thus met the statutory requirement.

2. When the case was called for trial, the trial court fully explained to the defense the possibility of challenging the method of selection of the petit jury in the Albany Division of the Middle District on the basis of *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5). Petitioner, however, waived his right to challenge the jury by a formal stipulation, approved by the trial court, which set forth that he had conferred with counsel before making this decision and that it was his desire to be tried by the then existing jury panel in the Albany Division (R. 18-19). For the first time on appeal, petitioner asserted—as he now claims in this Court—that, prior to executing the stipulation, the United States Attorney in the presence of his trial counsel advised him that if he objected to trial in the Albany Division on the ground that the jury was improperly constituted, he would have to be tried later in the Macon Division and that he entered the stipulation because he was not advised of his right under Rule 18, F. R. Crim. P., to object to such transfer and feared being tried by "a jury of strangers" in Macon (Pet. App. 17-18). This assertion is contradicted by an affidavit filed with the court of appeals by the United States Attorney (G. Br. App. 22-23),[2] as well as by an affidavit filed by petitioner's trial counsel which stated that the stipulation was entered into because of his and petitioner's

[2] "G. Br. App." refers to the appendix to the government's brief in the court of appeals, which is being lodged with this brief.

belief that the then existing jury panel would be tactically advantageous to the defense (G. Br. App. 21-22). The court of appeals correctly held that it could not go outside the record to make a determination in the first instance of petitioner's allegation (Pet. App. 20-21).

We note, in addition, that petitioner's own assertions establish that he attached more importance to trial by jurors who were not "strangers" than to trial by a jury convened in conformity with *Rabinowitz* (which transfer of the case to Macon would have secured for him). The gist of his objection is that he should have been informed that he had the absolute right to insist upon both. On its face, however, Rule 18—which was amended to repeal the former requirement of venue by division rather than merely by district—would not appear to create any absolute right in a defendant to insist upon trial in any particular division. The court of appeals' interpretive gloss upon the Rule in *Dupoint* v. *United States*, 388 F. 2d 39 (C.A. 5)—which seemingly has the effect of at least partially nullifying the amendment within the circuit—was not rendered until after trial of this case. Petitioner's choice of trial in Albany cannot be said to have been coerced because the trial court, the United States Attorney, and his own counsel did not anticipate the *Dupoint* decision and advise him accordingly.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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